IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
GARDEN STATE LIMOUSINE, INC.,	§	CASE NO. 01-31356-SAF-11
DEBTOR.	§	
	§	
BANK ONE, N.A., and WELLS FARGO BANK (TEXAS) NATIONAL ASSOC.,	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 01-3454
	§	
NICON, INC., NICHOLAS P. SINGELAKIS, and CONNIE L. SINGELAKIS,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Bank One, N.A., and Wells Fargo Bank (Texas) National Association, the plaintiffs, move the court for a summary judgment subordinating the liens and debt asserted by Nicon, Inc., Nicholas P. Singelakis, and Connie L. Singelakis, the defendants, to the banks. The plaintiffs also request that the court order the Chapter 7 trustee in the underlying bankruptcy case to release to the banks $493,000 held in escrow. The defendants oppose the motion, but have not filed a cross-motion for summary judgment. The court conducted a hearing on the motion on December 19, 2001.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

In January 1999, Nicon and its shareholders, Nicholas and Connie Singelakis, sold their New Jersey limousine business to Garden State Acquisition Corp., which subsequently changed its

name to Garden State Limousine, Inc. At the time, Garden State was a wholly owned subsidiary of Precept Business Services, Inc. Precept paid the initial portion of the purchase price, and Garden State executed a promissory note for the remainder of the purchase price, $680,000. Garden State also granted Nicon a lien and security interest in the assets purchased.

The promissory note, dated January 20, 1999, provides, in part: "This Note shall be subordinate to institutional or bank lenders in connection with loans made by such lenders to the Purchaser." The security agreement, also dated January 20, 1999, provides, in part, "[t]he Seller agrees to subordinate their security interests hereunder to institutional or bank lenders."

The banks entered a credit agreement with Precept on March 22, 1999. Garden State guaranteed Precept's obligations under the credit facility. Under a subsidiary security agreement, also dated March 22, 1999, Garden State granted the banks a security interest in its property. According to the affidavit of C. Dianne Wooley, First Vice President of Bank One, the banks "loaned funds to Garden State and its affiliates under a $40 million dollar credit facility."

On February 22, 2001, Garden State filed a petition for relief under Chapter 11 of the Bankruptcy Code. By order entered May 23, 2001, Garden State sold its assets. The sale order directed that $493,000 of the proceeds from the sale be escrowed

pending the determination of the priority and validity of the liens of Nicon and the banks, which is the subject of this adversary proceeding.

In the instant motion, the banks contend that Nicon agreed to subordinate its liens and debts to the security interests of institutional and bank lenders. The banks further contend that Nicon must be estopped from claiming a contrary position, that the Nicon lien is invalid as it did not attach to any collateral, and that the Nicon lien is limited to the property sold. The court addresses the issues in that order.

Under the Bankruptcy Code, the court may enforce a subordination agreement to the same extent the agreement would be enforced under applicable non-bankruptcy law. 11 U.S.C. §510(a). The parties agree that New Jersey law is the applicable non-bankruptcy law.

The banks contend that, under New Jersey law, Nicon agreed to subordinate both its debt and its liens to the banks. The banks assert that, under New Jersey law, the subordination provisions of the note and security agreement between Garden State and Nicon must be given their plain meaning. See Karl's Sales & Service, Inc. v. Gimbel Brothers, Inc., 592 A.2d 647 (N.J. Super. Ct. App. Div. 1991). The banks describe the provisions as self-effectuating and enforceable under New Jersey law. See O'Connor v. Arywitz, 165 A. 432 (N.J. Ch. 1933).

Nicon responds that the subordination provisions in the note and security agreement are so lacking in basic contractual requisites that a New Jersey court would either not enforce them or, alternatively, would find the provisions ambiguous, thereby requiring a trial. See Weichert Co. Realtors v. Ryan, 608 A.2d 280 (N.J. 1992)(discussing the terms necessary to create an enforceable contract); B.J.I. Corp. v. Larry W. Corp., 443 A.2d 1096 (N.J. Super. Ch. Div. 1982)(scrutinizing transaction).

The ordinary rules governing construction of contracts applies to the reading of a subordination agreement. Under New Jersey law, "[t]he polestar of contract construction is to discover the intention of the parties as revealed by the language used by them. To this end, the language used must be interpreted 'in accord with justice and common sense.'" J.L. Davis & Assocs. v. Heidler, 622 A.2d 923, 925 (N.J. Super. Ct. App. Div. 1993) (citations omitted); Dome Petro., Ltd. v. Employers Mut. Liability Ins. Co., 767 F.2d 43, 47 (3rd Cir. 1985)(applying New Jersey law).

> [W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written. . . . Effect, if possible, will be given to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. . . Thus, an agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose. . . The writing is to have a reasonable

> interpretation. Disproportionate emphasis upon a word or clause or a single provision does not serve the object of interpretation. The general purpose of the agreement is to be considered in ascertaining the sense of particular terms. The literal sense of particular words or clauses may be qualified by the context and given the meaning that comports with the probable intention. It is the revealed intention that is to be effectuated, the sense that would be given the integration by a reasonably intelligent person.

J.L. Davis, 622 A.2d at 926-27 (citations omitted). Accordingly, the court applies a common sense reading of the language of the note and security agreement, in light of the written documents and the sales transaction as a whole.

In the security agreement, Nicon agrees to subordinate its "security interest hereunder to institutional or bank lenders." But the statement does not expressly address bank loans "to whom." A common sense reading would infer that the provision refers to loans to Garden State, the other party to the agreement. Nicon expressly agrees to subordinate its security interest "hereunder." The word "hereunder" refers to the security interest granted to Nicon by Garden State in the security agreement dated January 20, 1999, between Garden State, the purchaser, and Nicon, the seller. In that security agreement, Garden State, the purchaser, grants a security interest in the assets purchased to Nicon, the seller. The security agreement provides that the "security interest shall terminate" upon satisfaction of the purchaser's obligations under the $680,000 note. The purchaser further agrees not to sell or

otherwise transfer, grant or suffer the imposition of a lien or security interest in the collateral inconsistent with the security agreement.

Reading the subordination provision in light of the agreement referenced in the sentence, Nicon, as seller, agrees to subordinate its security interest to institutional or bank lenders to Garden State, the purchaser. That reading gives a reasonable meaning to all parts of the instrument, as required by New Jersey law.

That reading is also consistent with the note, also dated January 20, 1999, which was part of the same sales transaction. New Jersey law requires that the subordination agreement be read in the context of the circumstances under which it was entered. In the note, Garden State, as purchaser, and Nicon, as seller, expressly state that the note is subordinate to institutional or bank lenders "in connection with loans made by such lenders to Purchaser." Thus, Nicon agrees that its rights under the note are subordinate to bank loans to Garden State. To complement and give meaning to that provision, under the security agreement, the subordination of liens likewise applies to bank loans to Garden State, the purchaser.

Only that reading gives a common sense meaning to each word of the subordination provisions of the security agreement and note, consistent with the security agreement and note as a whole.

Applying the New Jersey canons of contract construction, the subordination provisions are not susceptible to more than one rational meaning. A reasonable person would not read the agreements in light of the transaction as a whole to mean that Nicon agreed to subordinate its liens to bank loans to any corporation affiliated in some capacity with Garden State, the purchaser, without so expressly providing. The subordination provisions in the note and the security agreement are, therefore, unambiguous. As a matter of law, Nicon broadly agreed to subordinate its debt under the note and its security interest under the security agreement to bank loans made to Garden State.

Consequently, Nicon did not agree to subordinate either its debt or its security interest to bank loans to other legal entities, be they Garden State's parent corporation or affiliate corporations. The agreements apply only to bank loans to Garden State, the purchaser under the agreements.

Because of the application of New Jersey's canons of contract construction, the court need not consider the defendants' arguments that New Jersey would consider subordination provisions that are part of a sale of a business different from construction mortgages or other commercial transactions. Similarly, the court need not consider whether the subordination provisions should have contained other terms since Nicon broadly agreed to subordinate its debt and liens to bank loans to Garden State,

which constitutes a rational act within the context of the sales transaction.

Because the banks misread the agreements, they are not entitled to summary judgment. Because the agreements are unambiguous, the court does not need to conduct a trial to determine the parties' intent, as urged by the defendants. Because Nicon broadly agreed to subordinate its debt and liens to bank loans to Garden State, the court concludes that New Jersey courts would enforce the agreements.

In her affidavit, Wooley avers that the banks loaned $40 million to Garden State and its affiliates under the credit facility. But Wooley does not aver as to the amount, if any, actually loaned to Garden State, as opposed to its affiliates. The credit facility agreement is between the banks and Precept, Garden State's parent corporation, a separate legal entity. Garden State guaranteed the Precept debt, suggesting that Garden State did not receive the proceeds of the credit facility, else it would have entered its own credit agreement with the banks. The subsidiary security agreement recognizes that the banks had entered a credit agreement with Precept, which may directly or indirectly benefit Garden State. The guaranty and subsidiary security agreement, therefore, suggest that the banks may not have loaned any funds to Garden State. Consequently, there is a genuine issue of material fact as to whether the banks loaned

funds to Garden State.

The banks next contend that the defendants must be estopped from denying that Nicon's liens and debt had been subordinated to the banks' liens and debt. New Jersey law recognizes that a subordinator may be estopped from denying the effect of a subordination agreement against third parties who rely on that agreement. Weinstein v. Anderson, 139 A. 602 (N.J. Ch. 1927). The parties agree on the elements for the application of the estoppel doctrine. Nevertheless, there are genuine issues of material fact that preclude resolution on summary judgment. On the one hand, the summary judgment evidence suggests that Nicon and the Singelakises knew about the Precept-Garden State corporate relationship and that Precept paid the initial cash portion of the Garden State purchase price. On the other hand, the Wooley affidavit avers only an opinion that the banks believed that Nicon had subordinated its liens and debt to all of Garden State's parent and affiliate corporations. The banks present no summary judgment evidence to either establish that the banks acted on the conclusion that the Singelakises would have subordinated the Nicon liens and debts to loans made to Precept or that the banks would have reasonably or prudently relied on such a notion without an express statement to that effect. Nicholas Singelakis avers that he had no intention of subordinating his liens and debt to benefit a third person, and

that he acted to assure payment of the debt by assisting Garden State to obtain credit.

The banks argue that Nicon's lien did not attach to collateral because the security agreement does not reasonably identify the collateral, as required by New Jersey Statute 12A:9-203.a(3)(a). Schedule A to the security agreement reasonably identifies the collateral. Finally, the banks contend that the assets sold by Garden State to generate the escrowed funds are not covered by the Nicon lien. The description of the collateral covered by Nicon's security agreement with Garden State appears to include the sold property. The banks have presented no summary judgment evidence to support their contrary argument. In the absence of summary judgment evidence, the banks may not have a summary judgment on this point.

Based on the foregoing,

IT IS ORDERED that the motion for summary judgment is **DENIED.**

Dated this _____ day of January, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge